

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID MURDOCK)	
Claimant)	
VS.)	
)	Docket No. 184,731
PRIME ROOFING, INC.)	
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent appeals from the Award of Administrative Law Judge Robert H. Foerschler dated August 28, 1997. Oral argument was heard January 20, 1998, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, Kathryn P. Barnett of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the parties stipulated at oral argument that an average weekly wage of \$294.24 was appropriate and the issue of average weekly wage was no longer before the Appeals Board for decision.

ISSUES

- (1) Did claimant suffer an injury which disabled claimant for a period of at least one week from earning full wages at the work at which claimant was employed pursuant to K.S.A. 44-501(c) and Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996)?

- (2) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant suffered accidental injury arising out of and in the course of his employment with respondent on July 29, 1993, while working on a roofing job in Jackson County, Missouri. Claimant was standing in the bed of a dump truck when roofing materials weighing between 100 and 400 pounds were thrown off the roof into the truck, striking claimant on the left side of his head, cheek, and shoulder. Claimant's glasses were knocked off, a tooth was chipped, and he struck his left knee on the steel side of the truck bed. The police were called, but claimant declined medical treatment and completed his work day. The next day, July 30, 1993, claimant did not report to work because of pain in his jaw, upper body, and head. Thereafter, claimant continued working for respondent until August 23, 1993, at which time he voluntarily terminated his employment. Claimant missed work for unknown reasons on August 6, 11, 16, and 20. Claimant alleges he missed work as a result of the injuries suffered on July 29. Respondent, however, argues that claimant's attendance work history was less than stellar. Between June 1, 1993, and July 29, 1993, claimant missed work on June 3, 4, 11, 14, and 28, and on July 1, 2, 7, 8, and 21. Work was available on these days but claimant simply failed to appear. Respondent argues that, with the exception of a rain day on August 5 and the July 30 date claimant missed because of the pain, the other days were simply days claimant failed to appear for work for reasons unknown to respondent.

After terminating his employment with respondent, claimant went to work for KC Flatworks handling and forming concrete. Claimant worked for KC Flatwork through November 28, 1993. During that period of time, claimant sought no medical treatment for the injuries of July 29, 1993.

Beginning November 29, 1993, claimant began treatment with Alan Creek, D.O. Dr. Creek was provided the history of claimant being struck in the head with 300 to 400 pounds of material falling off the roof. At the time of the first examination in November 1993, claimant complained of headaches and shoulder pain with radiculopathy into his back. An MRI and x-rays of claimant's neck were negative. Dr. Creek diagnosed cervical strain with tension vascular headaches and a shoulder strain. Dr. Creek continued treating claimant with conservative care including medications, and physical therapy, and claimant was referred to Dr. Irakawa for trigger point injections and epidural injections. None of the treatment was successful in alleviating claimant's pain and ongoing headaches. Dr. Creek began to question claimant's ongoing complaints.

At the time of Dr. Creek's deposition, he had not been advised that claimant had worked for almost three months for a concrete company after the incident on July 29, 1993. When told, he opined that the concrete work, which would be considered heavy construction labor, could cause a strain to claimant's neck and would be an aggravating factor to the complaints exhibited by claimant from the July 29, 1993, injury.

Dr. Creek was unaware of claimant's prior sinus headaches for which he had been treated in 1982 and was also unaware that claimant had missed numerous work days prior to the July 29 incident. He felt it unusual for claimant to begin developing excruciating headaches four months after an injury when claimant was not having the daily excruciating headaches prior to that time. Claimant had experienced only intermittent headaches between the July incident and his termination of employment with KC Flatwork.

Dr. Creek's examinations of claimant elicited no objective findings. Claimant's range of motion in the neck and upper back were normal. Additional MRI studies done in June of 1994 of claimant's neck and brain were considered normal. Dr. Creek found claimant to have a good range of motion in his neck without tenderness. Claimant did mention to Dr. Creek that he was doing landscaping work but gave no specifics. Dr. Creek felt landscaping work, including mowing, lifting rocks and planting, could aggravate a cervical strain.

By December 21, 1995, claimant's pain complaints had spread to the lumbosacral spine. Dr. Creek continued treating claimant in February 1996, and the neurological exams continued to be normal. By November 1996, claimant's complaints of pain and numbness had extended into his legs. This was another new finding which Dr. Creek could not attribute to the July 1993 injury.

Dr. Creek last saw claimant in April 1997, at which time claimant had a normal range of motion in the neck. Claimant's loss of range of motion in the lumbar spine did not appear until 1996. Dr. Creek found claimant to have no permanent partial impairment other than pain associated with the headaches as a result of the injuries suffered on July 29, 1993. There were no objective indications of any deficits in the cervical spine, shoulders, extremities, or head. The only basis for claimant's ongoing complaints were pain with occasional musculoskeletal spasms in the neck which could be caused by tension or other factors besides the trauma. He did notice claimant's symptoms continued to get worse during his treatment, which he felt would have to be due to some sort of ongoing aggravating factor. Dr. Creek placed no restrictions on claimant as a result of the 1993 injury.

On May 23, 1994, claimant was seen by Timothy Stepp, M.D., a board-certified neurosurgeon, for an evaluation and examination. At the time of the examination, claimant had complaints including tingling in the scalp, intermittent headaches in the back of the head, extending into the temples, an aching sensation in his left biceps muscle and intermittent tingling in the left arm, ringing in the ears, and occasional long distance vision

problems. Claimant was also complaining of memory loss. Dr. Stepp's examination elicited no weakness in the upper or lower extremities and no range of motion problems. All of the tests proved normal including motor strength, sensation, deep tendon reflexes, gait, and claimant's ability to move his neck. There were no neurological deficits and the MRI of claimant's cervical spine and head were normal.

Dr. Stepp saw claimant again in June 1994, at which time claimant had additional symptoms that he wanted to discuss with the doctor fearing that he had overlooked them at the prior visit. These included soreness in the jaw and difficulty eating, interrupted sleep cycles, bilateral hand throbbing, and difficulty breathing. Again, claimant had a normal neurological examination including range of motion of the cervical spine. There was no evidence that claimant had difficulty with his memory, eyesight, hearing, or loss of strength in the extremities. Other than claimant's subjective complaints of pain, there were no indications of permanent injury from the July 29, 1993, injury. Dr. Stepp could find no structural abnormalities to explain claimant's ongoing symptoms. He assessed claimant a 2 to 3 percent whole body functional impairment as a result of claimant's subjective complaints but acknowledged, based upon objective findings, claimant had no functional impairment. Dr. Stepp felt there was no physical reason claimant could not return to work as a roofer.

Claimant was referred by his attorney to Daniel D. Zimmerman, M.D., for a physical examination on February 7, 1996. Dr. Zimmerman reviewed CT scans, MRIs, and x-rays as well as numerous medical reports. He diagnosed chronic cervical paraspinous myofascitis with greater auricular nerve entrapment syndrome, range of motion restrictions at the cervical level, chronic thoracic paraspinous myofascitis and lumbar disc disease at L5-S1 with radicular weakness affecting the left lower extremity.

Dr. Zimmerman acknowledged he was not aware which part of claimant's body was struck by the roofing material. The history given to Dr. Zimmerman by claimant failed to indicate complaints of neck or shoulder problems after the incident. Dr. Zimmerman noted that claimant did not report any lumbar symptoms immediately after the injury. Dr. Zimmerman was informed that claimant began seeking medical treatment for the injury within a month of the injury, which is contrary to the evidence in the record. During his examinations, Dr. Zimmerman saw no signs of drooling or slurred speech.

Dr. Zimmerman assessed claimant a 19 percent permanent partial impairment to the body as a whole using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

Claimant was referred by the Administrative Law Judge to Frank P. Holladay, M.D., a prominent local neurosurgeon, to perform an independent medical examination. In his July 2, 1996, report, Dr. Holladay indicated finding little of significance from a neurological standpoint, but did elicit complaints of tenderness at various spots. He felt that, despite claimant's multiple complaints, his studies were essentially normal, although he did note the

problems with the headaches which Dr. Holladay related to claimant's alleged concussion injury of July 29, 1993. Based upon a finding that claimant suffered a concussion in July 1993 and on the continual headaches, Dr. Holladay assessed claimant a 15 percent permanent partial impairment to the body as a whole.

Conclusions of Law

Respondent argues claimant failed to prove that he was disabled for a period of at least one week from earning full wages under K.S.A. 44-501(c) and, therefore, is entitled to medical compensation only. However, the Appeals Board notes first, the Boucher¹ defense was not raised before the Administrative Law Judge. As K.S.A. 44-555c allows for review by the Appeals Board upon questions of law and fact as presented and introduced before the Administrative Law Judge, and as this issue was not raised to the Administrative Law Judge, the Appeals Board finds it inappropriate for the issue to be raised for the first time before the Appeals Board. The statute clearly prohibits additional evidence from being placed into the record before the Appeals Board, and to allow issues to be raised for the first time before the Appeals Board when the opposing party is prohibited from providing evidence in rebuttal would be a due process denial. Even if the Appeals Board were to consider the Boucher defense raised by the respondent under K.S.A. 44-501(c), the Appeals Board would not modify its ruling. It is uncontradicted that claimant missed work on July 30, 1993, due to the pain in his head and jaw. There were also four additional days in August 1993, when claimant was not at work. While respondent argues this is simply claimant's lackadaisical work attitude and not related to the injury, it is nevertheless uncontradicted that claimant was not at work on those days, and he testified that he missed work on those days as a result of the pain associated with his July 29, 1993, injuries. Thus, the Appeals Board would find that claimant missed those days from work because of his injury and, therefore, is not limited under K.S.A. 44-501(c) to medical compensation only.

With regard to the nature and extent of claimant's injury and/or disability, in proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends.² Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. The burden of proof must be established by a preponderance of the credible evidence.³

¹ Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

² K.S.A. 44-501(a).

³ K.S.A. 44-508(g); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability.⁴ In this instance, the evidence is contradictory. On the one side, Dr. Creek, claimant's treating physician for a several year period, and Dr. Stepp, a board-certified neurosurgeon, who saw claimant on more than one occasion, both felt claimant's ongoing symptoms were not explainable when considering the physical findings from their examinations of claimant, the results of the various tests performed upon claimant, and the almost total lack of physical evidence supporting an ongoing injury. Dr. Creek also felt it unusual that claimant's headaches would become so much more severe several months after the injury without additional aggravation. He was also concerned with the additional symptoms developing in claimant's back and lower extremities in 1996, several years after the accident. Neither Dr. Creek nor Dr. Stepp would place any restrictions upon claimant's ability to perform work. Dr. Creek felt claimant had no permanent impairment resulting from the July 29, 1993, incident. Dr. Stepp, giving claimant the benefit of the doubt, felt claimant had a 2 to 3 percent whole body impairment based solely upon claimant's subjective complaints, with no objective findings supporting any functional limitations.

On the other hand, Dr. Zimmerman, claimant's hired medical expert, and Dr. Frank Holladay, the court appointed independent medical examiner, felt claimant suffered a permanent partial impairment from 15 to 19 percent to the body as a whole. In considering the report of Dr. Holladay, the Appeals Board is concerned by the lack of relevant information provided Dr. Holladay regarding claimant's history of headaches or the time lost from work prior to the accident. In addition, no doctor diagnosed a concussion at the time of claimant's accident.

In addition, the report of Dr. Zimmerman indicates a less than complete history of claimant's employment after the injury and a misunderstanding as to how long claimant delayed before seeking medical treatment after the July 29, 1993, incident. Dr. Zimmerman was unaware of the claimant's history of headaches, as was Dr. Holladay. As stated above, claimant was treated for sinus headaches in 1982 and according to the owner of respondent, Mr. Kent Pippert, claimant regularly took medication for headaches prior to the July 29, 1993, injury.

The Appeals Board is also concerned with the fact that claimant was capable of working for the Stonewall Inn through 1995. This work involved landscaping, moving railroad tiles and rocks, digging holes, lifting bags of fertilizer, attending and caring for shrubs and plants and grass, and on at least one occasion, organizing and running a golf tournament. During this entire time, claimant alleged headaches and other ongoing symptoms which, while severe, did not necessitate that claimant seek any type of medical treatment until four months after the date of accident. Claimant argues that he suffered

⁴ Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

from a significant loss of memory and that he failed to seek medical care because he has no memory of the incidents which occurred during this several month period.

At the time of the regular hearing, claimant was alleging that he suffered from daily sweats, ringing in the ears, headaches, left knee pain, left shoulder pain, neck pain, bilateral arm pain, more pronounced on the left, numbness and tingling in the arms and into the legs bilaterally, pain and soreness in the low back with radiculopathy through the buttocks to the right knee and left foot, a chipped tooth, and significant memory loss. Many of these symptoms did not exist at the time claimant first sought medical treatment, but developed over a period of several years.

The Appeals Board finds that, while claimant may have numerous symptoms on display, there is little, if any, medical evidence to support claimant's allegations that they are related to the July 1993 accident. In considering the overall medical evidence, the Appeals Board finds the opinions of Dr. Creek and Dr. Stepp to be the most credible regarding what, if any, problems claimant may have had from this July 29, 1993, incident. First, they had the opportunity to examine claimant on more than one occasion with Dr. Creek treating claimant for several years. They also had the opportunity to review the many tests performed on claimant which were all normal. The Appeals Board, in giving claimant the benefit of the doubt, finds that the 2 to 3 percent whole body functional impairment assessed by Dr. Stepp for claimant's subjective complaints is an appropriate award in this matter. The Appeals Board, therefore, finds that claimant has suffered a 3 percent permanent partial impairment to the body as a whole as a result of the injury suffered on July 29, 1993. Neither Dr. Creek nor Dr. Stepp limited claimant in any way from performing work, including any tasks claimant performed in the past. Therefore, the Appeals Board finds claimant is not entitled to any work disability under K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 28, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David Murdock and against the respondent, Prime Roofing, Inc., and its insurance carrier, CNA Insurance Companies, for an accidental injury which occurred July 29, 1993, and based upon an average weekly wage of \$294.24. Claimant is entitled to 12.45 weeks at the rate of \$196.17 per week or \$2,442.32, for a 3 percent permanent partial disability to the body as a whole, all of which is due and owing at the time of this Award and is ordered paid in one lump sum minus any amounts previously paid.

All authorized medical is ordered paid by respondent.

Future medical treatment for claimant's injuries may be awarded upon proper application to and approval by the Director of Workers Compensation.

Unauthorized medical in the amount of \$500 is awarded to the claimant to help defray the expense of the Wilmore Chiropractic Center.

Prescriptions contained in Exhibit 3 of the regular hearing in the amount of \$1,159.56 and Exhibit 5 in the amount of \$752.43 including the balance to Dr. Harr of \$103 are ordered paid by the respondent. The record reflected no bill for the treatments provided by Dr. Creek.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Hostetler & Associates, Inc.	\$488.60
Richard Kupper & Associates	\$209.95
Metropolitan Court Reporters, Inc.	\$893.14
William V. Denton & Associates	\$666.80

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kathryn P. Barnett, Kansas City, KS
Anton C. Andersen, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director